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AIDS:LEGAL ISSUES

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AIDS: LEGAL ISSUES*

ISSUE DEFINITION

Acquired Immune Deficiency Syndrome (AIDS) is a fatal, communicable disease of pandemic proportions caused by the human immunodeficiency virus (HIV). At present there are no vaccines and no significantly effective anti-viral therapies for this disease. In some Canadian cities, AIDS -also called HIV-disease or HIV/AIDS - already robs young men of more years of potential life than cancer, heart disease or accidents. The number of women and their newborn children who are affected is growing rapidly. AIDS is, moreover, distinct from other human diseases because complex social, legal, and political phenomena surround its medical and scientific aspects. This review summarizes some of the issues of a primarily legal nature - including discrimination, immigrants and visitors to Canada, federal prisons, criminal law and civil litigation.

BACKGROUND AND ANALYSIS

A. Discrimination

AIDS first appeared among, and still hits hardest, socially marginalized groups, such as gay men and injection drug users, who were already often subject to discriminatory attitudes and actions. In addition, despite vigorous public education and awareness campaigns stressing that HIV is not transmitted through casual contact, many people still fear any contact with a person who is infected with HIV. As a result, people living with HIV/AIDS suffer the effect of both stigmatization and discrimination, which not only results in hardship and indignity and exacerbates their many other problems, but also hampers public health efforts to respond to the disease.

* The original version of this Current Issue Review was published in April 1994; the paper has been regularly updated since that time.



Discrimination arises in many areas of life: employment, accommodation, child custody, education, entry into Canada, detention of infected persons as criminal defendants or prison inmates and even health care. A 1989 study by the B.C. Civil Liberties Association indicated that discrimination in employment was the most common problem, and most of the human rights commission cases have involved the employment context.

Federal and provincial human rights commissions deals primarily with discrimination in regard to employment, accommodation, and public services. They have taken the view that discrimination against persons who have, or are perceived to have, HIV/AIDS is prohibited on the ground that the discrimination is based on a "disability" or "handicap" within the meaning of human rights legislation. The Canadian Human Rights Commission adopted such a policy in May 1988. Because the protection also covers those who are "perceived" to have this disability, the policy also extends to those who are discriminated against because of their association with those infected with HIV, or simply because they are members of a high risk group.

Similar policies have been confirmed on the provincial level by human rights commissions and tribunals. In June 1988, the Ontario Human Rights Commission approved a settlement involving a nurse, Ronald Lentz, who had been dismissed by his employer, the Toronto Western Hospital, when it learned that he had AIDS. In October 1988, the British Columbia Human Rights Council made an express finding that HIV/AIDS was protected as a "disability" in the case of *Biggs and Cole v. Hudson*. This decision also found that discrimination against those in high risk groups or those who associate with people in such groups was equally prohibited.

In April 1995, a Quebec Human Rights Tribunal ordered a Quebec City dentist to pay \$3,000 in compensation for refusing to treat a man who was HIV-positive. The tribunal rejected the dentist's claim that there was a serious or real threat of transmission of the virus. The tribunal also ordered the dentist to stop refusing to accept as patients people with HIV/AIDS. The Quebec government subsequently adopted a regulation making a dentist's refusal to treat patients who are HIV-positive or who have AIDS a disciplinary matter.

In 1989, a Canadian Human Rights Tribunal dealt with the first case on the federal level. *Fontaine v. Canadian Pacific Ltd.* involved Gilles Fontaine, a cook with a CP work crew at a remote site. When Fontaine's HIV-positive status became known, the CP supervisor suggested to him that he posed a threat to the health of the members of the crew, and might be in danger of

attack by them. Fontaine quit his job out of fear, but the tribunal found that he had, in effect, been dismissed by CP because of his HIV status. The decision thus affirmed that employers cannot discriminate against employees because fellow workers mistakenly fear that HIV can be spread through casual contact, even when the contact involves such activities as food service. The Federal Court of Appeal upheld the decision in November 1990, in a case argued on jurisdictional grounds (*Canadian Pacific Ltd. v. Canadian Human Rights Commission*).

Another important federal case involved a sailor, Simon Thwaites, who was dismissed from the Canadian Armed Forces (CAF) in 1989, after nine years' service, when it was learned that he was HIV-positive. In June 1993, finding that the CAF had discriminated against Thwaites on the ground of disability, a Canadian Human Rights Tribunal awarded him over \$152,000 for past and future lost wages and for hurt feelings. The panel found that the navy had not adequately considered whether Thwaites could continue to perform as an electronic-warfare specialist aboard ship despite his HIV status, and had made no effort to offer him a shore job. It also found that an earlier recommendation had been made for his release from the Forces on the basis of homosexuality. The award of \$5,000 for hurt feelings was the maximum award possible. The Tribunal also ordered that the CAF pay Thwaites' legal costs, estimated to be between \$80,000 and \$90,000.

The CAF then applied to have the decision reviewed by the Federal Court. In the interim it refused to pay the compensation ordered by the Tribunal; however, in September 1993, a judge of the Federal Court ordered the CAF to pay the full amount of the compensation pending the review. On 25 March 1994, the Trial Division of the Federal Court upheld the Human Rights Tribunal decision.

Human rights legislation provides for statutory exceptions to the non-discrimination requirement. In the employment context this is usually known as a *bona fide* occupational requirement (b.f.o.r.). The May 1988 policy of the Canadian Human Rights Commission included three examples of circumstances in which freedom from HIV infection might at that point have been considered a b.f.o.r. The Commission states that these examples were based on the medical and scientific evidence concerning HIV/AIDS available at the time, and the then current case law concerning relevant levels of risk. All three examples were controversial from the outset. The circumstances were: where the employee performed "invasive procedures" (health care

workers such as surgeons); where the job required travel to countries that bar entry to those who are HIV-infected; or where the safety of the public was involved and the person would be working alone.

The question of "invasive procedures" being performed by HIV-positive persons continues to be controversial. The current Canadian Medical Association policy, for example, does not bar surgery by those who are HIV-infected, although it urges caution and a continuing study of the risks of exposure and transmission. Although the second exception, for travel to countries that ban the entry of HIV-positive persons, would appear to be reasonable, there are relatively few cases in which it would apply. The third example, involving the safety of the public, according to the Commission reflected a belief, based on the limited medical evidence then available, that HIV infection might possibly lead to damage of the brain or central nervous system which could show up at any time. Current medical thinking does not appear to regard this as a significant danger; for example, a report by the Ontario Law Reform Commission cites evidence that otherwise healthy HIV-infected individuals are not more likely to present a clinically significant cognitive impairment than uninfected individuals."

An official of the Canadian Human Rights Commission acknowledges that the b.f.o.r. element of the 1988 policy may be out of date, and is being re-examined in the light of current medical and scientific knowledge about HIV/AIDS. The policy is not binding on Canadian Human Rights Tribunal panels in any case, and the employer would bear the full evidentiary burden in attempting to justify discrimination as a b.f.o.r. in the examples given in the policy, or in any other circumstances. There have been no cases to date where a b.f.o.r. has been established.

Finally, either human rights statutes impose on employers a duty to reasonably accommodate the needs of those with a disability, if this can be done without undue hardship, or the courts have implied a duty of reasonable accommodation. In the *Biggs* case referred to earlier, the B.C. Human Rights Council confirmed that this duty would apply in cases of HIV/AIDS, and suggested that remedial orders should consider precautionary safety measures, support for those discriminated against, the education of fellow workers, and financial compensation.

Because many members of the public associate AIDS with gay and bisexual men, discriminatory attitudes based on disapproval of sexual orientation have a major impact on those

affected by the disease and on public health efforts to deal with it. Groups such as the Canadian AIDS Society speak of a "climate of homophobia, which in turn helps fuel discrimination against people living with HIV/AIDS." AIDS activists and other human rights groups pressed the federal government to add sexual orientation as a prohibited ground of discrimination to the *Canadian Human Rights Act*, thereby bringing the federal statute into line with the human rights legislation in most of the provinces and territories, including Nova Scotia, New Brunswick, Quebec, Ontario, Manitoba, British Columbia, and the Yukon.

Bill C-108, tabled in the House of Commons on 10 December 1992, would have added sexual orientation to the prohibited grounds under the federal Act. It would also, however, have added a definition of "marital status" that would have excluded same sex couples. The bill died on the Order Paper when Parliament was dissolved.

In the 1992 case of *Haig v. Canada*, however, the Ontario Court of Appeal found that the absence of sexual orientation from the prohibited grounds of discrimination in the *Canadian Human Rights Act* contravened the equality guarantees of section 15 of the *Canadian Charter of Rights and Freedoms*, and read the ground into the Act. The Attorney General for Canada announced that this decision would not be appealed and that the federal government would act in accordance with it. Thus, after October 1992, individuals were able to file complaints of discrimination on the basis of sexual orientation with the Canadian Human Rights Commission. In June 1996, Bill C-33 (S.C. 1996, c. 14) received Royal Assent and sexual orientation was added as a prohibited ground of discrimination to the federal statute.

B. Immigrants and Visitors

Many HIV/AIDS activists, supported by many others working in the fields of human rights and disability rights, urge that would-be immigrants to Canada not be rejected on the basis of their HIV status. Current government policy, however, rejects this view. Immigration applicants who are found to be HIV-positive are considered to be medically inadmissible because it can be expected that their admission would likely cause excessive demand on Canada's health or social services, pursuant to section 19(1)(a)(ii) of the *Immigration Act*.

There is, however, no routine testing for HIV, and asymptomatic HIV-positive immigrants may not be detected. The Medical Admissibility Review completed in 1992 recommended a review of the question of routine testing of immigrants for all communicable

diseases and medical conditions that would make heavy demands on the health care system. Consultations have been carried out within and between the relevant Departments and with the provinces, but no determination on routine HIV testing has as yet been made. A Private Member's motion introduced by Reform Party immigration critic Art Hanger would have required all applicants for permanent residence to be tested for HIV. The motion was defeated in the House on 31 October 1994, but not before gaining the support of 20 Liberal M.P.s. In July 1995, the Alberta government called for HIV testing for all immigrants.

Regulations regarding medical inadmissibility now being developed could affect the current situation whereby people known to be HIV-positive or to have AIDS are prohibited from entering Canada as immigrants. A first draft, pre-published in August 1993, provided for a five-year "window of comparison" in assessing excessive demand: applicants for immigration would be medically admissible where, over five years, they would not cost the Canadian health care system more than the average Canadian citizen or permanent resident. Thus "early" cases of HIV would be admissible to Canada. A revised draft of the regulations is expected to be pre-published shortly. There has been a suggestion that the "window of comparison" could be set at 10 years.

In April 1991, the Ministers of Health and Welfare and Employment and Immigration jointly announced a new policy for short-term HIV/AIDS visitors. It stated that a person living with HIV/AIDS did not constitute a threat to public health during short-term travel to Canada, and henceforth would be treated like any other visitor. Those who posed a risk of becoming a significant burden on the health care system while in Canada would still be generally inadmissible, or at least subject to a medical assessment, but the new policy effectively means that asymptomatic HIV-positive people entering Canada for a short term visit (less than six months) should not be denied entry or encounter trouble at the border because of their HIV status. New guidelines were issued to medical officers when the policy was announced and, according to departmental officials, made known to immigration officers at the border.

The new policy got off to a rocky start when an American man, Craig Rowe, alleged that he was denied entry for a three-day visit to Montreal on 29 December 1991. He sued the government, alleging that an immigration officer had told him that he posed a risk of becoming a burden on the health care system because he was HIV-positive. This was despite Mr. Rowe's being in good health, having private medical coverage, and possessing a return ticket indicating that

his intended visit was very brief. Mr. Rowe died in January 1995 and the government agreed to an out-of-court settlement with his family some 18 months later. An official of Citizenship and Immigration Canada also apologized to his family for the incident. The official noted that additional training of border personnel had been instituted, in part as a result of Mr. Rowe's experience.

C. Federal Prisons

The approach to dealing with HIV/AIDS in prisons is important both because of the government's duty to safeguard the health and dignity of inmates, and because of the additional threat to public health that eventually results if inmates become infected. Because sexual activity and drug use involving needle-sharing are realities in prisons the risk of HIV transmission is significant.

In October 1991, the Minister of Health and Welfare recommended that condoms, and possibly clean needles or at least bleach for cleaning needles, be provided to inmates to attempt to prevent the spread of HIV in prisons. The Solicitor General accepted the condom recommendation but rejected any action that might appear to condone drug use. Condoms and dental dams first became available in prisons in January 1992, but, because Correctional Service of Canada (CSC) policy implementation is decentralized, they can be obtained in some institutions only from health services staff, while in others they are also available anonymously in places such as canteens and from dispensing machines or open containers.

In June 1992, the Solicitor General announced the creation of an Expert Committee on AIDS and Prisons (ECAP) to make recommendations for further action. In July 1993, ECAP released a comprehensive Working Paper and in January 1994 submitted its Final Report.

The Final Report observed that inmates were reluctant to request condoms from health care staff. It recommended that condoms, dental dams, and water-based lubricant be discreetly and easily available in locations other than health care centres. It further recommended that consensual sexual activity no longer be an institutional offence. The Report also recommended that small quantities of bleach for cleaning needles be made easily and discreetly available to all inmates, and that confidential methadone maintenance programs be provided. It also suggested that there are several reasons for making clean needles available, but acknowledged that such action

would not be feasible at this time. It concluded, however, that steps be taken to find solutions that would make it feasible, including implementing a pilot needle exchange program.

Infected inmates thus have problems of access to therapies, treatment information and adequately trained health care professionals. Prisoners are also reluctant to be tested because they fear lack of confidentiality and because those known to be HIV-positive are frequently isolated from the rest of the prison population. The ECAP Report therefore recommended that inmates should have access to anonymous testing, not be subject to isolation if they are infected, and receive care comparable to that available in the community. The Paper further recommended that the CSC study the feasibility of using outside agencies to provide prison health services.

The Report noted that HIV/AIDS education and awareness programs have been instituted for inmates and staff, but recommended improvements to these programs, and to inmate alcohol and drug education programs, especially by encouraging more participation by peer prisoner and outside community groups, with funding being provided in each case. The Report also made recommendations in regard to a host of other issues: seroprevalence studies, the confidentiality of inmate medical information, anti-discrimination measures, the furnishing of health kits to all inmates, the prevention of non-consensual sexual activity, tattooing, skin piercing, tuberculosis, compassionate release, aftercare, and the special needs of female and aboriginal inmates.

In its Response, the CSC appeared to have accepted most of the recommendations of the ECAP Final Report. Much of this acceptance, however, involved the Report's "softer" recommendations, such as those for strengthening various education programs. In some cases, the CSC stated that its acceptance was really a reaffirmation of its current policy and practice; one example was the housing of HIV-infected inmates with the rest of the inmate population (although the CSC also agreed to revise the relevant Commissioner's Directive to clarify the exceptions to this non-segregation policy).

Some of the ECAP Report's more controversial, and perhaps more important, recommendations were tested first on a small pilot project basis. For example, the CSC tested a bleach distribution program in one institution (Matsqui), which has been extended to all institutions. Likewise, the CSC agreed to promote voluntary HIV testing vigorously, but it intended to run a pilot anonymous testing program (using an outside agency) at one institution only. After

researching other correctional jurisdictions, it was decided to develop an implementation plan for voluntary full-scale anonymous testing in all institutions. The CSC flatly rejected the ECAP recommendations to have pilot needle exchange programs, consider the feasibility of having prison health services provided by outside agencies, provide methadone maintenance programs, and remove current prohibitions on consensual sexual activity between inmates.

The isolation of HIV-infected inmates in hospital and segregation units has been challenged in court by several federal prisoners. Although the Ontario Court of Justice found that isolation was warranted in one of the cases before it (*Ratte v. Kingston Penitentiary (Warden)*), it affirmed that in general such isolation is not justified. The federal Public Service Staff Relations Board, in the case of *Walton v. Treasury Board (Correctional Service Canada)* (1987) has also determined that prison staff are not entitled to refuse to work with HIV-infected inmates, although the ECAP Report recommended that further protective measures for staff, based on the universal precautions approach, should be developed.

D. Criminal Law

While public health experts maintain that the vast majority of people who know that they are HIV-infected act responsibly, there are some who deliberately or recklessly transmit or risk transmitting the virus, particularly through unprotected sex. Although the *Criminal Code* offence of wilfully transmitting a venereal disease was deleted in 1985, a few men have been charged regarding the transmission of HIV under several other sections of the Code, with varying results.

The only charge that clearly seems to apply to transmission through unprotected sex, the primary threat to public health, is criminal negligence causing bodily harm. Although there have been at least two guilty pleas to this charge (*R. v. Scott William Wentzell in Nova Scotia*, and *R. v. Mercer, in Newfoundland*), there has been only one trial, and the accused in that case, Charles Ssenyonga of London, Ontario, died before a judgment was rendered. Although he was under a public health order banning him from having sex, he apparently infected three women through unprotected sex, having denied that he was infected when questioned by his partners.

Despite Ssenyonga's death, the Crown asked for a judgment on the criminal negligence charge, on the ground that the previous successful charges had been guilty pleas, and a definitive ruling was needed to clarify that this Code offence does apply to reckless transmission of HIV through unprotected sex. The trial judge refused the application, however. Comments by the Newfoundland Court of Appeal in a judgment on the sentence levied in the *Mercer* case appear to affirm that the charge does apply in these circumstances, but the conviction itself was not directly in issue in that judgment. **A Quebec man has recently been charged with criminal negligence causing bodily harm, in similar circumstances.**

Charges of aggravated sexual assault have been attempted on three occasions (*R. v. Lee* and *R. v. Ssenyonga* and *R. v. Cuerrier*). The charges were based on the fact that the accused had not informed their partners that they were HIV-positive. In each case, there was an acquittal on the ground that this omission did not vitiate the consent. **The Crown appealed the *Cuerrier* case to the B.C. Court of Appeal; the decision has been reserved.**

In 1989, an Ottawa man, James Thornton, was charged with being a common nuisance for knowingly donating HIV-infected blood and thereby endangering the lives of the public at large. That conviction was upheld by the Supreme Court of Canada. It is unclear, however, whether this charge also applies in cases of sexual transmission. Two men (in *R. v. Sumner* and *R. v. Kreider*) have pleaded guilty to being a common nuisance for knowingly having unprotected sex with two women; however, an Ontario judge in *R. v. Ssenyonga* discharged the accused on that same charge at the preliminary hearing, on the basis that the public in general had not been endangered.

In May 1993, an official of the Department of Justice was quoted as saying that the Department was studying the creation of a specific offence of knowingly (and presumably recklessly or negligently) transmitting HIV to others, but no action has been taken. Similar laws exist in a number of American states and one Australian state. In October 1995, a Reform Member of Parliament introduced a Private Member's bill in the House of Commons (C-354) which would have created two new criminal offences where any person wilfully or recklessly infected another person with HIV. The bill died on the Order Paper when the session ended.

There has been an obvious disparity in sentencing. In the Nova Scotia *Wentzell* case, the accused pleaded guilty to criminal negligence causing bodily harm for infecting a woman

through unprotected intercourse. Here, the victim was pregnant and the judge found that the accused had a history of "previous promiscuous sexual activity." The sentence was three years. In the Newfoundland *Mercer* case, where the man pleaded guilty to the same charge for infecting two women, the Newfoundland Supreme Court of Appeal raised the original sentence of 27 months to 11 years, because the man had deceived his victims and because his crimes were "of monumental proportions." Leave to appeal the sentence was denied by the Supreme Court of Canada in March 1994.

While many would like to see more charges laid against those who endanger the lives of others, some public health experts argue that the criminal law is ill-suited to deal with the threat of reckless HIV transmission. They argue that the application of the law is spotty, that its deterrent effect is doubtful, and that prison sentences offer little scope for long-term behaviour modification. They also suggest that the threat of criminal sanctions may cause those possibly infected with HIV to avoid being tested.

E. Civil Litigation

In the United States, there has been a great deal of civil litigation covering a broad range of issues concerning the spread of HIV. In Canada, however, only transmission of HIV through the blood supply has led to a substantial number of infected persons seeking redress through the civil courts. It is perhaps now unlikely, however, that all of those particular actions will proceed to judgment.

Before screening of the blood supply and heat-treating of blood products began in 1985, it was believed that almost 800 hemophiliacs and some 300 transfusion patients (detected so far) had been infected with HIV through the blood system. These figures have since almost doubled as more cases have come to light. The federal government announced a compensation plan in December 1989. In 1990 the provincial health ministers decided that they would act together in this matter, or not at all. The provinces did not decide to offer compensation until September 1993; in the intervening years those infected through the blood supply had begun civil actions in most provinces.

The defendants in these actions include the Canadian Red Cross Society, the provincial governments, the federal government, hospitals, physicians, some pharmaceutical companies, and even, in a few cases, the Canadian Hemophilia Society. So far only one of the claims has been adjudicated; a class action in Quebec was rejected on the technical ground that it was filed too late and one in Ontario was found not to be eligible.

Before the provincial offer of compensation was announced in September 1993, some claimants were quoted as saying that they would abandon their actions if adequate compensation was offered by the provinces. It was a condition of the compensation offer that those accepting it would waive the right to continue with court actions against the provinces, the Canadian Red Cross, and other defendants, although the waiver may be challenged in court on the basis that many signed it before the Commission of Inquiry on the Blood System in Canada (see below) was established. Claimants were given until 15 March 1994 to accept or reject the offer. Although press reports indicated that not all of those involved regarded the provinces' offer as adequate, apparently those infected through the blood supply were dying of AIDS at the rate of almost three a week. When the deadline had passed, the Canadian Blood Agency confirmed that of the 917 people declared eligible and sent settlement agreements, 868, or approximately 95%, had signed and returned these.

The day before the deadline for accepting the provincial compensation offer, an Ontario resident, Rochelle Pittman, was awarded \$515,000 in her action against the Red Cross, a hospital, and the family doctor. The case was somewhat unusual, in that the family doctor had been aware that Mrs. Pittman's husband had been infected with HIV by a blood transfusion, but had decided not to tell him. Mrs. Pittman was subsequently infected unknowingly by her husband. (She died of AIDS in May 1995).

The award was not based on negligence for failing to screen the blood given to Mr. Pittman, but on failure to search out and warn those who were potentially infected; that is, for not having conducted a "lookback" program after it became known that tainted blood had been used. The case was thus not helpful to those who had been directly infected and who were suing on the basis of negligence in that the HIV virus in the blood they were given had not been detected. This issue is currently being tried in an Ontario court in two cases. Damages were established

before the parties went to trial, so the sole issue is whether or not the Red Cross was negligent in permitting the transfusions of tainted blood.

There have been isolated examples of civil actions not involving the blood supply. A Victoria B.C. woman, Kobe ter Neuzen, who was infected with HIV as a result of an artificial insemination procedure in January 1985, was awarded \$883,800 in damages for negligence by her doctor. The trial judge had instructed the jury that they could find the general practice to be negligent. The judgment was overturned in June 1993 when the B.C. Court of Appeal ruled that the proper test was whether the doctor's procedures had conformed to the prevailing standards of practice at the time. The Supreme Court of Canada dismissed the plaintiff's appeal and ordered a new trial on two points raised by the case. Mrs. ter Neuzen will proceed on those issues. Whatever the outcome of this case, it is unlikely that a similar case will arise in the future; since 1985 standardized tests have been available for screening sperm donors for HIV antibodies in blood.

In June 1993, an Ontario judge ruled that a woman might proceed with a \$1,450,000 action against her estranged husband for fraudulent misrepresentation and deceit. The woman alleges that her husband was actively bisexual during the marriage, and, although he knew that this put him at high risk of becoming infected with HIV, he concealed from her the resulting risk to her own health. The action is ongoing. Also, two victims of Charles Ssenyonga, the Ontario accused who died before a judgment was given on criminal negligence charges, went before the Ontario Criminal Injuries Compensation Board in August 1993, seeking the maximum award of \$25,000.

The Board, however, limited the awards of the three women to \$15,000 each, faulting them for entrusting their lives "to an almost complete stranger on such a brief acquaintance." The three then appealed to the Divisional Court. In a decision released on 10 February 1995, the Court awarded the full \$25,000, after finding that the Board had "erred in law in demanding an unreasonably high standard of behaviour" from the women. The Court further noted: "The conduct of the accused was so outrageous that any lack of prudence on the part of the victims pales into oblivion."

PARLIAMENTARY ACTION

The Ad Hoc Parliamentary Committee on AIDS was established in 1989 under the chairmanship of the Hon. David MacDonald, M.P., and included Members of the House of Commons from all parties and several Senators. It conducted hearings in the spring of 1990 for the purpose of making recommendations for the National Strategy on AIDS, which was then in development. The committee released a comprehensive report in June 1990.

On the issue of discrimination, the Ad Hoc Committee recommended that sexual orientation be added to the *Canadian Human Rights Act* (accomplished in June 1996), and that more be done to publicize protection against discrimination based on HIV as a disability. The committee also made a number of recommendations with regard to federal prisons, including making condoms and bleach for needle decontamination available to all inmates on a confidential basis.

In May 1993, the House of Commons Standing Committee on Health and Welfare, Social Affairs, Seniors and the Status of Women tabled a report entitled "Tragedy and Challenge: Canada's Blood System and HIV." Its Sub-Committee on Health Issues had conducted lengthy hearings on the contamination of Canada's blood supply by HIV between 1980 and 1985. One of the Committee's recommendations was that the federal government urge and assist the provincial and territorial governments to develop and implement compensation programs for persons infected by HIV through the Canadian blood system. It also recommended that a public inquiry be carried out into the past and present operation of the system. As noted above, the provinces announced an offer of compensation in September 1993. The federal and provincial governments also accepted the recommendation for a public inquiry, and the Commission of Inquiry on the Blood System in Canada began its deliberations under Mr. Justice Horace Krever in November 1993. It published an interim report early in 1995.

The Krever Inquiry became controversial in December 1995 when, in numerous notices it issued to individuals and organizations pursuant to the *Inquiries Act*, it stated that the final report might find instances of misconduct. As a result, in January 1996 the federal government, eight provinces (all except Ontario and Saskatchewan), the Red Cross Society, four pharmaceutical companies and a significant number of others filed legal actions in the Federal Court of Canada

asking the court to rule that Justice Krever not be permitted to make any findings of misconduct that could found criminal or civil liability. The Quebec government also challenged the jurisdiction of the Commission to investigate the affairs of the government of a province, but dropped this position in the face of public pressure. The legal actions were heard together by the court at the end of May 1996. **A decision released in late June cleared the way for the Inquiry to continue, and to find fault against the Red Cross and the federal government. The Inquiry resumed public hearings in August.**

CHRONOLOGY

- June 1987 - In *Walton v. Treasury Board (Correctional Services Canada)* the Public Service Staff Relations Board found that prison staff are not entitled to refuse to work with HIV-infected inmates.
- May 1988 - The Canadian Human Rights Commission adopted a policy for protecting those living with HIV/AIDS against discrimination.
- June 1988 - The Ontario Human Rights Commission approved a settlement between Ronald Lentz, a nurse, and his employer, the Toronto Western Hospital. Lentz had been dismissed when it was learned that he had AIDS.
- October 1988 - In *Biggs and Cole v. Hudson* the British Columbia Human Rights Council found that HIV/AIDS was protected from discrimination, as being a "disability."
- June 1989 - In *R. v. Thornton*, an Ontario man was convicted of being a common nuisance for knowingly donating HIV infected blood to the Red Cross. He was sentenced to a prison term of 15 months. The conviction and sentence were upheld by the Supreme Court of Canada in June 1993.
- September 1989 - The Alberta Court of Appeal upheld the sentence of one year in prison and three years on probation in the case of *R. v. Sumner*. The accused had pleaded guilty to a charge of being a common nuisance for engaging in unprotected sexual intercourse. Charles Ssenyonga of Ontario was later charged with the same offence on similar facts. He was discharged at the preliminary inquiry stage on the ground that the unprotected sex, though it had infected three women, had not endangered the general public.

- October 1989 - In *Fontaine v. Canadian Pacific Ltd.*, a Canadian Human Rights Tribunal found CP responsible for discrimination on the basis of a disability. In November 1990, the Federal Court of Appeal upheld the decision in the case of *Canadian Pacific Ltd. v. Canadian Human Rights Commission*.
- December 1989 - In *R. v. Scott William Wentzell*, a Nova Scotia man was sentenced to three years in prison after pleading guilty to criminal negligence causing bodily harm.
- June 1990 - The Ad Hoc Parliamentary Committee on AIDS released a report entitled "Confronting a Crisis."
- April 1991 - In *R. v. Lee*, an Ontario man was acquitted on a charge of aggravated assault, the Crown's case having been based on the man's failure to tell a sexual partner of his HIV-positive status.
- April 1991 - The Ministers of Health and Welfare and Employment and Immigration made a joint announcement of a new policy for short-term HIV/AIDS visitors to Canada.
- September 1991 - In *Ratte v. Kingston Penitentiary (Warden)*, the General Division of the Ontario Court of Justice found that in general the isolation of HIV-infected prison inmates is not warranted. The Court upheld the action on the facts of this particular case, however.
- October 1991 - The Minister of Health and Welfare recommended that condoms and possibly clean needles, or bleach for the decontamination of needles, be provided to inmates of federal prisons.
- January 1992 - Condoms and dental dams first became available to prisoners in federal penitentiaries.
- April 1992 - Charles Ssenyonga of Ontario was acquitted of three counts of aggravated sexual assault. The charges had been based on his failure to advise his partners that he was HIV-positive. In July 1993, Ssenyonga died in hospital shortly after the trial judge reserved judgment on three charges of criminal negligence causing bodily harm.
- June 1992 - Employment and Immigration Canada and Health and Welfare Canada released the report of the Medical Admissibility Review.
- 15 June 1992 - The Solicitor General created the Expert Committee on AIDS and Prisons.

- 25 June 1992 - Craig Rowe, an American, commenced an action against the federal government in the Federal Court of Canada, alleging that he had been denied entry to Canada for a short-term visit on 29 December 1991 because he was HIV-positive.
- August 1992 - In *Haig v. Canada*, the Ontario Court of Appeal found that the absence of sexual orientation from the prohibited grounds of discrimination in the *Canadian Human Rights Act* contravened the equality guarantees of section 15 of the Charter, and read the ground into the Act.
- 10 December 1992 - Bill C-108 was tabled in the House of Commons. One clause of the bill would have added sexual orientation to the prohibited grounds of discrimination under the *Canadian Human Rights Act*. The bill died on the Order Paper when Parliament was dissolved on 8 September 1993.
- May 1993 - The House of Commons Standing Committee on Health and Welfare, Social Affairs, Seniors and the Status of Women tabled a report entitled "Tragedy and Challenge: Canada's Blood System and HIV."
- June 1993 - In the case of *Thwaites v. Canadian Armed Forces*, a Canadian Human Rights Tribunal found that a sailor had been discriminated against when he was dismissed by the Forces (CAF) because he was HIV-positive. The CAF then applied for judicial review of the decision in the Federal Court, which upheld the Tribunal decision (see below).
- June 1993 - The Expert Committee on AIDS and Prisons released a Working Paper.
- June 1993 - In the case of *Kobe ter Neuzen v. Korn* the British Columbia Court of Appeal overturned a judgment in favour of a woman infected with HIV during an artificial insemination procedure, and ordered a new trial. This decision was appealed to the Supreme Court of Canada, which affirmed the Court of Appeal decision in 1995. A new trial will be held.
- August 1993 - The Newfoundland Court of Appeal, in the case of *R. v. Mercer*, raised the original sentence of 27 months levied at trial to a total term of 11 years in prison. The accused man had pleaded guilty to two counts of criminal negligence causing bodily harm. The Supreme Court of Canada refused leave to appeal.

- September 1993 - The provinces and territories made an offer of compensation to those infected with HIV through the blood supply. Those who accept the compensation were required to give up the right to sue, and were given until 15 March 1994 to accept or reject the offer.
- October 1993 - The Commission of Inquiry on the Blood System in Canada ("The Krever Inquiry") was established.
- 21 January 1994 - The Expert Committee on AIDS and Prisons submitted its Final Report.
- 3 March 1994 - The Supreme Court of Canada denied leave to appeal in the case of *R. v. Mercer*.
- 14 March 1994 - Rochelle Pittman was awarded \$515,000 in an action against the Red Cross, the hospital, and the family doctor.
- 15 March 1994 - Of those eligible for the provincial offer, approximately 95% accepted it by the specified deadline.
- 25 March 1994 - The Trial Division of the Federal Court upheld the Tribunal decision in the *Thwaites* case.
- 11 April 1995 - A Quebec Human Rights Tribunal ordered a dentist to compensate a man he had refused to treat because of his HIV status.
- January 1996 - Legal challenges halted work on the final report of the Krever Inquiry.
- June 1996 - Royal Assent was given to the bill adding sexual orientation as a prohibited ground of discrimination in the *Canadian Human Rights Act*.
- The Federal Court cleared the way for the Krever Inquiry to continue.

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